IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

Writ Petition No. 6713 of 2000

M/s. Desouza Motors .. Petitioner
V/s.
The Income Tax Settlement Commission
& Others .. Respondents

WITH

Writ Petition No. 6718 of 2000

M/s. Collenic Bus and Coach Builders .. Petitioner
V/s.
The Income Tax Settlement Commission
& Others .. Respondents

WITH

Writ Petition No. 6724 of 2000

M/s. Nicholas Desouza Garage .. Petitioner
V/s.
The Income Tax Settlement Commission
& Others .. Respondents

Mr. Atul Jasani i/b. Mr. C.V. Kothari for the Petitioner
Dr. P. Daniel with Mr. G. Hariharan for the Respondents

CORAM : DR. S. RADHAKRISHNAN &
J.H. BHATIA, JJ.
DATED : 09.08.2005.

P.C.:-

1. Heard the learned counsel for the Petitioner and the Respondents. In all the above three Petitions, as the identical question of law is involved, we are disposing of all the three above Petitions by this common order.

2. As far as Writ Petition 6713 of 2000 is concerned, it appears that the Petitioner’s case therein was pending before the Settlement Commission, however, during the pendency, the Petitioner also approached the designated Authority under the Kar Vivad Samadhan Scheme, 1998 and under the said scheme, the designated

Authority finally determined the income of the Petitioner for the assessment year 1988-89, 1989-90, 1992-93 and 1993-94 with regard to the same assessment years even the Settlement Commission determined the income with regard to the aforesaid assessment years and the following chart will be clear with regard to the same:-

Assessment Year	Income related to KVSS	Income determined by S. Commission	Difference
1988-89	1,21,420	1,21,420	Nil
1989-90	1,60,987	2,08,010	47,023
1992-93	2,39,060	2,39,060	Nil
1993-94	1,09,790	1,09,790	Nil

Similarly, in Writ Petition No. 6718 of 2000, the following chart will indicate the income in respect of which disputed tax was settled under the Kar Vivad Samadhan Scheme:-

Assessment Year	Income related to KVSS	Income determined by S. Commission	Difference
1988-89	2,89,650	2,89,650	Nil
1989-90	3,00,130	3,00,130	Nil
1993-94	2,53,500	2,53,500	Nil

Similarly, in Writ Petition No. 6724 of 2000, the following statement shows the income in respect of which disputed tax was settled under the Kar Vivad Samadhan Scheme:-

Assessment Year	Income related to KVSS	Income determined by S. Commission	Difference
1986-87	7,52,740	7,52,740	Nil
1987-88	8,42,774	8,42,770	4
1988-89	8,57,829	8,57,830	1

1989-90	8,39,130	8,39,130	Nil
1993-94	49,55,723	49,55,725	2

3. There is no dispute that in the above three Petitions, the designated Authority has issued the final certificate under section 90(2) read with section 91 of the Finance (Act No. 2), 1998 under the Kar Vivad Samadhan Scheme, 1998, as full and final settlement of arrears.

4. In all the three Petitions, the Settlement Commission had construed the provisions of section 245 D to mean that as the Application was pending before the said Settlement Commission, the Settlement Commission was not empowered to allow the Petitioner to withdraw the same and the Settlement Commission was also entitled to proceed with the same and decide and accordingly had decided the tax liability.

5. Shri Jasani, the learned counsel appearing on behalf of the Petitioner contends that in all the above three matters brought to our notice that under the entire Kar Vivad Samadhan Scheme, 1998, the whole objective is that once the designated Authority passes a final order under section 90(2), if one were to read Section 90(4), it would be apparent that all the proceedings by way of Appeal, Reference etc., which were pending, all shall be deemed to be withdrawn, so as to give effect to the final certificate issued under section 90(2) by the designated Authority. In that

behalf, he brought to our notice, the provisions of section 90, which reads as under:-

Section 90:-

"(2) The declarant shall pay, the sum determined by the designated authority within thirty days of the passing of an order by the designated authority and intimate the fact of such payment to the designated authority along with proof thereof and the designated authority shall thereupon issue the certificate to the declarant.

....
....

(4) Where the declarant has filed an appeal or reference or a reply to the show cause notice against any order or notice giving rise to the tax arrear before any authority or Tribunal or Court, then, notwithstanding anything contained in any other provisions of any law for the time being in force, such appeal or reference or reply shall be deemed to have been withdrawn on the day on which the order referred to in sub-section (2) is passed:"

Similarly, he also brought to our notice the provisions of Section 95, which deals with the issue that the scheme shall not apply in certain cases. As far as Petitioners are concerned, Section 95(i)(b) would be relevant, which reads as under:-

95(i)(b) in a case where an order has been passed by the Settlement Commission under sub-section (4) of section 245D of the Income tax Act or sub-section (4) of section 22D of Wealth-tax Act, as the case may be, for any assessment year, to any tax arrear in respect of such assessment year under such direct tax enactment;

6. Shri Jasani, brought to our notice that originally

when the bill was introduced, there was an ambiguity with regard to the provisions as in the Bill in 1998,

the said Section 98 (i)(b), which reads as under:-

> 98(i)(b) in a case where an order has been passed by the Settlement Commission under any direct tax enactment for any assessment year, to any tax arrear in respect of such assessment year under such direct tax enactment;

Therefore, he pointed out that there was no clear indication as to which order that has been passed by the Settlement Commission, whether the order passed under section 245 D(1) or final order under section 245D(4). Shri Jasani now points out that when the Act came into force, the said position has been made explicitly clear. Any order under section 95(i)(b), which specifically states that only when an order has been passed by the Settlement Commission under sub section (4) of Section 245D of the Income Tax Act, the provisions of the aforesaid Kar Vivad Samadhan Scheme, 1998 shall not apply. There is no dispute that in all the three cases, no final order was passed under section 245 D (4) of Income Tax Act by the Settlement Commission at the relevant time.

7. Shri Jasani, also brought to our notice two judgments of the Supreme Court interpreting the scope of the said section 90 of Kar Vivad Samadhan Scheme and the effect of an order being passed under section 90.

He referred to judgment of the Supreme Court in **Smt. Sushila Rani v. Commissioner of Income Tax and Another** **(2002) 253 ITR 775**, wherein the Supreme Court has held as under:-

> " An examination of the scheme of section 89, 90 and 91 of the Kar Vivad Samadhan Scheme would reveal that every person entitled to make a declaration under the said scheme was obliged to submit the declaration on or before January 31, 1999; that a period of 60 days has been stipulated under section 90(1) for the designated authority under the scheme to determine the amount payable by the declarant and the certificate to this effect under section 90(1) has to be granted by the designated authority after determination towards full and final settlement of the tax arrears within a period of sixty days. Thereafter, except on ground of false declaration made by the declarant, every order passed under sub-section (1) of section 90 determining the sum payable under the scheme, is absolutely conclusive as to the matters stated thereunder and no matter covered by such order can be reopened in any other proceeding under any law for the time being in force. After this determination under section 90(1) of the Kar Vivad Samadhan Scheme, another certificate is issued under section 91 of the Kar Vivad Samadhan Scheme on the basis of which immunity is granted to the declarant from instituting any proceeding for prosecution for any offence under any direct tax enactment or indirect tax enactment.
>
> ....
> ....
>
> We may notice that a certificate issued under section 90(1) of the Kar Vivad Samadhan Scheme making a determination as to the sum payable under the Kar Vivad Samadhan Scheme, is conclusive as to the matters stated therein and cannot be reopened in any proceedings under any law for the time being in force, except on the ground of false declaration by any declarant. Therefore, before issue of a notice, there should be satisfaction that the declarant has made a false declaration. There is no such allegation in the course of the notice issued. All that is stated is that "adjustments already made should have been taken into account

> when calculating the tax arrears. As such there is a mistake in calculation, which needs rectification". The whole basis of the notice is only that adjustments already made had not been taken note of. If this is the basis of the issuance of the notice and not the false declaration and that information was available with the Department even at the time of the finalisation of the proceedings under section 90 of the kar Vivad Samadhan Scheme, we fail to understand as to how the matter could be reopened at this stage. That information was already available with them and there is no false declaration in that regard. In that view of the matter, the notice issued is without jurisdiction."

Similarly, the Supreme Court in another judgment in **Killick Nixon Ltd. v. Deputy Commissioner of Income Tax and others 2002 (258) ITR 627**, held as under:-

> "As far as the provisions of the Kar Vivad Samadhan Scheme are concerned, we agree with the contention of the learned senior counsel for the assessee that the order to be made by the designated authority under section 90 is a considered order which is intended to be conducive in respect of tax arrears and sums payable after such determination towards full and final settlement of tax arrears. Once the declarant makes payment of the amount so determined under section 90, the immunity under section 91 springs into effect. We are also of the view that upon such declaration being made, tax arrears being determined, paid and certificate issued under the Kar Vivad Samadhan Scheme, there is no jurisdiction for the Assessing Officer to reopen the assessment by a notice under section 143 of the Act except where the case falls under the proviso (2) of sub-section (1) of section 90 as it is found that any material particular furnished in the declaration is found to be false. In the present case, it is not the case of the Revenue that any material particular furnished by the appellant-assessee in the declaration was found to be false. Consequently, the Assessing Officer could not have reopened the assessment by a notice under section 143 of the Act."

8. Shri Jasani, therefore, contended that the Settlement Commission totally erred in holding that the

application before it was pending and as such, did not allow the Petitioner to withdraw the same.

9. Dr. Daniel, the learned counsel appearing on behalf of the Respondents sought to justify the order of the Settlement Commission, contended that any order passed under section 245D by the Settlement Commission would be a bar for the assessee to proceed with the Kar Vivad Samadhan Scheme 1998 and he strongly relied on the Bill to indicate that in the Bill, section 95(i)(b), there was no such distinction made and as such contended that the order passed by the Settlement Commission is fully justifiable and there is nothing illegal or perverse in the same.

10. Having regard to the facts and circumstances of the case, it is explicitly clear from the provisions of the section 90(2) of the Kar Vivad Samadhan Scheme 1998, Chapter IV of Finance (No. 2) Act, 1998 that only if an order is passed by the Settlement Commission under sub section 4 of section 245 D of the Income Tax Act, the said Kar Vivad Samadhan Scheme, 1998 will not apply. As pointed out hereinabove, there is no dispute that no final order was passed by the Settlement Commission under sub section (4) of section 245 D, when the above matter was taken up.

11. Over and above, as it was pointed out, that once the final certificate is granted under section 90(2)

effect would be that all the proceedings and other orders come to an end and the order passed under section 90(2) shall prevail over other orders and thereafter total immunity is granted to the assessee concerned. The bar would arise only if, there is an order passed by the Settlement Commission under section 245 D(4) and not otherwise.

12. Under the aforesaid facts and circumstances, and in view of the aforesaid very clear specific and express provisions, we have no doubt in our mind, that the Petitioners are entitled to succeed and accordingly Rule is made absolute in terms of prayer clause (a) and (b), however, with no order as to costs, in all the above three Petitions.

(DR. S. RADHAKRISHNAN, J.)

(J.H. BHATIA, J.)